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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 730

MAGGIE F. ANDERSON, *Petitioner*

v.

W. P. BOWERS, Individually and as Collector of
Internal Revenue for the District of
South Carolina

On Petition for a Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 6-15) is reported at 77 F. Supp. 980. The opinion of the Court of Appeals (R. 20-25) is reported at 170 F. 2d 676.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1948. (R. 25.) A petition

for rehearing was denied on January 17, 1949. (R. 52.) A petition for a writ of certiorari was filed on April 15, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

A taxpayer received in 1941 a check for \$25,106.99, representing commissions allowed her by a Probate Court as executrix of her husband's estate. Although there was no restriction on the taxpayer's power to cash the check and use the proceeds, she did not do so until 1943, when she used the proceeds to discharge a personal tax liability. In these circumstances, did the Court of Appeals err in holding that the \$25,106.99 constituted taxable income in 1941?

STATUTES AND REGULATIONS INVOLVED

These appear in the Appendix, *infra*, pp. 9-11.

STATEMENT

J. L. Anderson, a resident of Cheraw, South Carolina, died testate on February 18, 1940. By his will he left his entire estate to his widow, the taxpayer in this case, with the exception of certain debts owed to him by his four children which were forgiven. The taxpayer was appointed as sole executrix of the estate, duly qualified as executrix, and administered the estate. On February 28, 1941, she filed a final accounting, which was approved by the Probate Court for Chesterfield County, South Carolina. The estate was then

closed and she was discharged as executrix. (R. 6, 8, 15-16.)

Among the items in taxpayer's final account as executrix was a claim for commissions as executrix in the amount of \$25,106.99, which amount was allowed by the Probate Court. Taxpayer as executrix signed a check dated February 28, 1941, in the amount of \$25,106.99 drawn on the estate account and payable to herself individually. Taxpayer's son, who generally looked after her affairs, gave a receipt in her name to the estate for the amount of the check and held the check as her agent. No review of the Probate Court's allowance, under the applicable provisions of state law, was ever sought by the taxpayer or any other interested party. (R. 6-7, 15-16.)

Although there were no restrictions on the taxpayer's power to cash the check and use the proceeds for any purpose she desired, she did not cash the check in 1941. Together with checks payable to the four children, in an aggregate amount of \$18,387.31, it was voluntarily put aside in order to create a fund for the payment of additional estate taxes which, it was anticipated, the Commissioner might assess. On March 15, 1942, the taxpayer filed her income tax return for 1941, in which she included the \$25,106.99 as income and paid the tax due thereon. (R. 7-8, 16.)

In 1943 the anticipated contingency occurred. The Commissioner asserted an additional estate

tax against the estate in an amount slightly in excess of \$60,000, resulting in part from the disallowance as a deduction to the estate of \$18,499.49 of the commission paid the taxpayer. (R. 16, 21.) The taxpayer was personally liable for the payment of the additional estate tax. Revised Statutes, Sec. 3467, as amended, 31 U.S.C. 192.

Thereafter the taxpayer filed with the Commissioner of Internal Revenue a claim for refund of \$10,072.74 of the tax paid for 1941 on the ground that she had erroneously included in her return the \$18,499.49 of the executrix's commissions which the estate had not been allowed to deduct. The claim was disallowed, and this suit was instituted to recover the amount of \$10,072.74 with interest from March 15, 1942. (R. 16-17.)

On these facts the District Court concluded as a matter of law that the taxpayer received taxable income of \$25,106.99 in 1941. (R. 17.) Accordingly, it entered judgment against the taxpayer. (R. 18.) This judgment was affirmed by the Court of Appeals.

ARGUMENT

1. Petitioner urges that certiorari be granted upon the ground that the Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions. In fact, however, examination of the record and the decision below shows clearly that resolution of the question of state law was not necessary to the

decision of the Court of Appeals and was not so regarded by that Court. (R. 23.)

The petitioner asserts that the commissions allowed by the Probate Court were in excess of those allowable under South Carolina law and that consequently the Probate Court was without jurisdiction and its order a nullity. The Court of Appeals, "with some diffidence," ventured to express the view that the approval of the commissions was within the jurisdiction of the Probate Court and that its order, even if erroneous, was valid until reversed. (R. 23.)¹ But the Court of Appeals made it clear that this was not the basis of its opinion. After briefly discussing the question of state law, the Court said (R. 23-24):

But however this may be, our decision must be the same, for the case is clearly governed by

¹ Moreover, taxpayer has failed to demonstrate that the view expressed in the lower court's opinion is in conflict with the law of the State of South Carolina. Under the applicable statutes of that state, an executor's commissions are admittedly limited to an amount not exceeding \$2.50 for every hundred dollars received and \$2.50 for every hundred paid out. In the instant case the commissions approved by the Probate Court, though computed at a rate which did not exceed \$2.50 per hundred, were calculated on the basis of the total gross amount of the estate received and disbursed as set forth in the statute. Taxpayer has, however, referred to no statutory provision or decision of the courts of South Carolina to the effect that an order of the Probate Court approving an excessive commission is without jurisdiction and thus a nullity. Under the circumstances no valid reason exists for rejecting the views of the Court of Appeals as to this question of local law. Cf. *Estate of Spiegel v. Commissioner*, 335 U. S. 701; *Helvering v. Stuart*, 317 U. S. 154.

the principle announced in *North American Oil v. Burnet*, 286 U. S. 417, 424, where the court said: "If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent."

* * *

From these decisions it is clear that when income has been received by the taxpayer or credited to him under a claim of right, it must be accounted for in the year in which it was received or could have been received by him; and if it is shown in a subsequent year that the payment was wrongfully made and the taxpayer is required to make restitution, his remedy is not to sue the Collector to recover the excess tax mistakenly paid but to claim the repayment as a deduction from income in the year in which it is made. This procedure is required because income taxes are imposed and must be accounted for on a yearly basis under the decision of *Burnet v. Sanford & Brooks Co.*, 282 U. S. 359, 365.

This ground of decision is plainly independent of state law.

2. The decision of the Court of Appeals is in harmony with applicable decisions of this Court and other federal courts. Since the record discloses no restriction upon the taxpayer's power to

cash the check and use the proceeds immediately upon receipt of the check in 1941, it is clear that the check represented income in that year, no matter when cashed. *Lavery v. Commissioner*, 158 F. 2d 859 (C. A. 7th); *Hedrick v. Commissioner*, 154 F. 2d 90 (C. A. 2d), certiorari denied, 329 U. S. 719; Treasury Regulations 103, Sec. 19.42-2 (Appendix, *infra*). As is made clear by the quoted extract from the opinion of the Court of Appeals, *supra*, pp. 5-6, the status of the commission actually received under a claim of right in 1941 as taxable income in that year was not affected by the fact that the taxpayer might thereafter have been compelled to restore to the estate all or a part of the sum so received. *North American Oil v. Burnet*, 286 U. S. 417, 424; *St. Regis Paper Co. v. Higgins*, 157 F. 2d 884 (C. A. 2d), certiorari denied, 330 U. S. 843; *Penn v. Robertson*, 115 F. 2d 167 (C. A. 4th); *Barker v. Magruder*, 95 F. 2d 122 (C. A. D. C.); *National City Bank v. Helvering*, 98 F. 2d 93 (C. A. 2d). In point of fact, the taxpayer never restored to the estate any part of the excessive commission²—a fact which also disposes of her

² The Commissioner, determining that the commission paid by the estate to the taxpayer exceeded by \$18,499.49 the amount permitted by the laws of South Carolina, disallowed this sum as a deduction by the estate. (R. 16.) See Section 812 (b) (2) of the Internal Revenue Code (26 U.S.C. 812). This disallowance, which was concerned solely with the estate tax payable by the estate, obviously did not serve to reduce the commission actually paid previously to the taxpayer.

contention that the excessive commission constituted "property acquired by gift, bequest, devise or inheritance." In short, she received it as a commission under claim of right, retained it as such, and used it to discharge her personal liability under Section 3467 of the Revised Statutes (Appendix, *infra*).

CONCLUSION

The decision below is correct, is in harmony with prior decisions of this Court and the Courts of Appeals, and is not in conflict with any decision of the courts of South Carolina. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY, 1949

APPENDIX**Internal Revenue Code:****SEC. 22. GROSS INCOME.**

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, * * * of whatever kind and in whatever form paid, * * *.

(26 U. S. C. 22.)

SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. * * *

(26 U. S. C. 42.)

SEC. 900. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this subchapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection,

and the provisions prohibiting claims and suits for refunds):

(1) *Transferees*.—The liability, at law or in equity, of a transferee of property of a decedent, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this subchapter.

(2) *Fiduciaries*.—The liability of a fiduciary under section 3467 of the Revised Statutes (U. S. C., Title 31, Section 192) in respect of the payment of any such tax from the estate of the decedent.

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

* * *

(26 U. S. C. 900.)

Revised Statutes:

SEC. 3467 [as amended by Section 518 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680]. Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

(31 U. S. C. 192.)

Treasury Regulations 103, promulgated under the
Internal Revenue Code:

SEC. 19.42-2. *Income not reduced to possession.* Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. A book entry, if made, should indicate an absolute transfer from one account to another. * * *